## TAY SAY GEOK & ORS. v. H.G. WARREN

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.)
February 28, 1963]

[K.L. — F.M. Civil Appeal No. 34 of 1962]

*Contract for sale of land — Deposit — Purchaser failing to complete — Forfeiture of deposit — Claim for return — Whether time of the essence — Principles on which equity will intervene.*

The appellants entered into a contract with the respondent for the sale of certain pieces of land belonging to the appellants on May 31, 1960. Two days before the execution of the contract the respondent paid to the appellants a sum of $90,000 which represented approximately 10% of the agreed price. Clause 3 of the contract recited that this sum was paid by way of deposit and in part payment of the purchase price. The purchase was to be completed and the balance of the purchase price paid on or before August 7, 1960. Clause 8 provided that if the purchaser should fail to complete the purchase in accordance with the agreement, the deposit of $90,000 would be considered as liquidated damages and forfeited to the appellants.

On August 8, 1960, a meeting was held between the respondent and the appellants' agent at which the respondent asked for extension of time to pay the balance of the sale price and time was given on the making of certain payments. On August 10, 1960 the respondent's solicitors wrote to the appellants' solicitors proposing the payment of certain sums in order that the appellants should extend the time for completion for a period of two months from the date of the acceptance of this offer. On the following day, the appellants' solicitors replied accepting the offer and stating that the date of acceptance should be deemed to be August 8, 1960.

On August 17, 1960 the purchaser's solicitors sent a draft of the supplemental agreement for the appellants' approval. This draft embodied the terms contained in the letter of August 10, and provided that the date of completion under the original contract should be October 18, and that time should be of the essence of the original contract. It also included a clause whereby the appellants would allow the respondent to sell portions of the land before the extended date of completion and to pay the proceeds thereof as part of the purchase price. On August 19, the appellants' solicitors telegraphed the respondent's solicitor that the said clause was unacceptable and that if the sums agreed to be paid for the extension of time were not paid by August 20, 1960 the sum of $90,000 would be forfeited. There was no reply to this and on August 22, 1960 the appellant's solicitors asked for the return of the titles. In November the respondent commenced the present proceedings claiming the return of his deposit of $90,000 but did not claim specific performance. The appellants counterclaimed for specific performance or alternatively rescission of the contract and a declaration that the $90,000 was forfeited.

The learned trial judge gave judgment for the plaintiff as prayed on the ground that time was not of the essence of the contract. On appeal,

**Held:** (1) an action for return of the deposit is essentially a claim at common law under which the appellants were entitled to forfeit the deposit on the failure of the respondent to fulfil his obligation to pay the balance of the purchase price on August 8, 1960;

(2) assuming that the rule in equity, that time is not of the essence of the contract unless expressly or impliedly made to be so, applied, the respondent was not entitled to specific performance if he had asked for it because he was at no time willing or ready to perform his own obligations under the contract;

(3) the claim for the return of the deposit depends on whether in all the circumstances of the case equity would relieve the person in default from forfeiture of his deposit; in the present case there was no ground on which equity would have given or should give relief.

*Cases referred to:—*

(1) *Howe* v. *Smith* (1884) 27 Ch. D. 89.
(2) *Lai Choon* v. *Fong Chow* 5 F.M.S.L.R. 233.
(3) *Stickney* v. *Keeble* [1915] A.C. 386.
(4) *Tilley* v. *Thomas* (1867-68) L.R. 3 Ch. 61.
(5) *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* 43 I.A. 26.
(6) *Roberts* v. *Berry* 3 D.M. & G. 284.
(7) *Pape* v. *Westacott* [1894] 1 Q.B. 272.
(8) *Steedman* v. *Drinkle* [1916] A.C. 275.
(9) *Mussen* v. *Van Diemen's Land Co.* [1938] 1 All E.R. 210.
(10) *Scott* v. *Alvarez* [1895] 2 Ch. 603.
(11) *Stockloser* v. *Johnson* [1954] 1 All E.R. 630.

### COURT OF APPEAL.

*W. H. Sault* and *H. B. Ball* for the appellants.

*R. Ramani, R. H. V. Rintoul* and *C. Selvarajah* for the respondent.

*Cur. Adv. Vult.*

**Thomson C.J.:** The appellants in this case are the owners of seven pieces of land in the State of Malacca. These pieces of land, which I shall call "the land", vary in size from 7 to 346 acres and are held on separate titles but geographically they form a single homogeneous area of some 496 acres which has been planted and is used as a single rubber estate. Throughout the transactions with which we are concerned the first appellant, Mr. Tay Say Geok (whom I shall call "the vendor") has acted on behalf of the other appellants, who are his two wives and his daughter-in-law, and for the purpose of these proceedings the land can be conveniently treated as his. The respondent (whom I shall call "the purchaser") is a chartered accountant in Kuala Lumpur.

Early in 1960 the vendor was minded to sell the land and he authorized his brother, Mr. Tay Say Keng, to act on his behalf to find a purchaser. He gave his brother a so-called "option document" which fixed a price of $1,800 an acre and which stated (*sic*) "if this sale is put through the buyer has to pay 10% deposit down first and the balance to be paid within one month".

Some time in May, 1960, Mr. Tay Say Keng got in touch with the purchaser who expressed interest in the proposed sale and there was a meeting between them at which a Mr. Williams and a Madam Chong, neither of whom has been called as a witness, were also present. There was some discussion of a general nature at that meeting and in the event the purchaser paid Mr. Tay Say Keng $1 and was handed the so-called "option document" in return.

The purchaser then telephoned a Mr. Raja who was at the time in London and told him that there was a rubber estate for sale and that Mr. Williams would be going to London and would discuss the matter with him. What happened between Mr. Raja and Mr. Williams in London is not altogether clear, but it is plain that Mr. Raja became interested in the purchase of the estate, though at this stage he was under the impression that the price asked was not $1,800 an acre but $2,300 an acre. It would appear that some sort of arrangement had been made, to which Mr. Raja was not a party, by which the estate would be purchased, presumably by the purchaser, at a price of $1,800 an acre and then transferred at a price of $2,300 an acre to a company called Austral Asia Plantations Limited which was to be formed and in which Mr. Raja was to have a large interest. There was some suggestion that the profit on this transaction, that is to say the difference between $1,800 and $2,300 an acre, was to be some sort of a commission for Mr. Williams. The evidence regarding this is somewhat meagre and confused and as it does not affect the issues in the case as it now stands little useful purpose would be served by examining it very closely.

Whatever happened in London, however, Mr. Williams sent the following telegram to the purchaser in Kuala Lumpur, which was received on 17th May, 1960:—

"BID AS ARRANGED SUBJECT TO CONTRACT DEPOSIT ON SIGNING CONTRACT TELEPHONING YOUR HOUSE 17TH WILLIAMS."

On 19th May the purchaser's solicitors wrote to the vendor's solicitors a letter enclosing a draft contract for the purchase of the land by the purchaser and stating that their client was arranging for a deposit to be made and asking to have the titles for inspection. There followed some discussion between the two solicitors as to terms of the contract and in the event, on 28th May, the purchaser's solicitors paid $90,000 to the vendor's solicitors, that being approximately 10% of the agreed purchase price which was in the neighbourhood of $893,000, and on 31st May the parties executed the contract.

It is to be noted here that this $90,000 was part of the proceeds of a cheque for $120,000 that the purchaser had had from Mr. Raja. It is also to be observed that $120,000 is a little more than 10% of what Mr. Raja originally thought was the total purchase price, that is something in the neighbourhood of $1,120,000.

The purchaser has at all times taken the attitude that he had no intention of buying the land for himself, and indeed at his very first meeting with the vendor's brother when he received the "option document" he said he had a buyer whom he did not then name. Nevertheless there is no mention of that in the contract which he and the vendor and the members of the vendor's family executed on 31st May, 1960. That contract recited that the vendors had agreed to sell and the purchaser, who was described as such, had agreed to buy the pieces of land specified in the Schedule and amounting to 496 acres 1 rood at a price of $1,800 an acre. By Clause 3, $90,000 was to be paid on or before the execution of the contract "by way of deposit and in part payment of the said purchase price". The purchase was to be completed and the balance of the purchase money paid on or before 7th August, 1960. The purchaser was to be at liberty to enter into possession of the property on execution of the contract. The only other provision which is material here is Clause 8 which reads as follows:—

"If the purchaser shall fail to complete the purchase in accordance with this agreement then the deposit of Dollars Ninety thousand ($90,000) paid by the purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the vendors and the purchaser shall thereupon surrender possession of the said property buildings and machinery to the vendors and this agreement shall be at an end."

The position at this stage was thus that the purchaser had to pay some $800,000, being the balance of the purchase price, on or before 7th August. It is clear, however, that either he did not have the money or that he was not prepared to pay it or that Mr. Raja was not prepared to provide it. The Austral Asia Plantations Limited was formed, though it does not appear to have played any significant part in the affair, and the Indian Overseas Bank was approached for a loan with what success is not stated on the evidence.

Eventually consideration was given to the possibility of an arrangement of a sort that is not uncommon among persons engaged in what is somewhat curiously called land development and to which I shall, for convenience, refer as the "instalment sales arrangement". In this country it is well known that small pieces of rubber land which are held on good separate titles are saleable at a much higher price per acre than larger pieces. After discussing the matter with an experienced land broker from Seremban, the purchaser and Mr. Raja concluded that if they could sell off the smaller pieces of land comprised in the vendor's land before having to pay the whole of the purchase price the proceeds, which might well be as high as $2,300 an acre, would go a long way towards making up the total purchase price and in the event they would have acquired the larger pieces at a comparatively small price per acre and with a much lower cash outlay than would otherwise have been necessary and these larger pieces could then have been operated as a rubber estate by Austral Asia Plantations Limited.

In the meantime, on 20th July, the vendor's solicitors wrote to the purchaser's solicitors regarding the draft conveyance and in the course of this letter they said:—

"You will recollect that the date of completion of purchase has been fixed for the 8th proximo.

As our client expects payment of the balance of the purchase money on that date, we shall be glad if you will now let us have the draft conveyance ..... for our approval in readiness for completing the matter on the 8th August, 1960."

I pause here to observe that it is common ground that in this letter "8th August" is a mistake and the date should be "7th August" but that the point has no bearing on the case as a whole.

The reply to that letter of 20th July is not in evidence. It would appear that the purchaser's solicitors asked for an interview to be arranged between them and the vendor but there is nothing to shew whether that interview ever took place and if it took place what was discussed at it.

Then on 8th August, that is the day after the date for completion under the contract, there was a meeting at the purchaser's house between him and the vendor's brother. The broker from Seremban was also present as was Madam Chong. The question of paying the balance of the purchase price was discussed. The purchaser said he could not pay unless he was given an extension of time and after one or two telephone conversations between the vendor's brother and the vendor, who was in Malacca, it was agreed that some extension of time should be given on the purchaser making certain payments. The question of the instalment sales arrangement was also discussed at this meeting but it is not at all clear as to whether it was mentioned in the course of the telephone conversations between the vendor and his brother which were in Chinese. The recollection on the point of the broker from Seremban was that the brother had said he would "speak with his brother and make him agree".

Be that as it may, the purchaser gave instructions to his solicitors and on 10th August they wrote a letter to the vendor's solicitors. As it is important not only for what it contains but also for what it does not contain it must be quoted in full. It read:—

"In consequence of certain discussions that have taken place between our clients and representatives of your clients we are instructed to make the following proposal with regard to the completion of the above purchase.

In consideration of the payment of the sum of $12,500 in manner following, that is to say:—

(1) As to $2,500 thereof upon your clients' acceptance of this proposal (hereinafter called the Acceptance Date).

(2) As to $5,000 thereof on or before the 31st August, 1960.

(3) As to the balance of $5,000 on or before the 30th September, 1960.

Your clients will agree to extend the time for the completion of the said purchase for a period of two months from the Acceptance Date, subject to the following conditions:—

(A) The purchaser shall pay to the vendors the sum of Thirty thousand dollars ($30,000) on the Acceptance Date by way of further deposit and in part payment of the purchase price and the balance shall be paid on the extended date fixed for the completion of the purchase.

(B) The purchaser shall pay to the vendors the sum of $3,000 on the Acceptance Date by way of deposit to cover the cost of weeding and maintenance of the rubber lands agreed to be sold for the period from the Acceptance Date to the extended date for completion. The vendors will account to the purchaser for the said sum of $3,000 and refund to the purchaser on completion the balance if any remaining in their hands.

(C) The sum of $12,500 hereinbefore referred to is payable in addition to the purchase price and is not in part payment thereof.

We should be glad to hear from you at your early convenience that the above proposals are acceptable to your clients."

That letter has been quoted *in toto* and it will be observed that there is not a word in it regarding the proposed instalment sales arrangement though at the time the purchaser said in evidence he had discussed it with the writer. The letter asks for time and it offers to pay for time but the money mentioned in it is payment for time and not payment for time *plus* acceptance by the vendor of the instalment sales arrangement.

The following day the vendor's solicitors replied in the following terms:—

"We have seen our client thereon who accepts the terms contained in your letter subject to the following:—

It is to be understood that the two sums of $5,000 each payable on 31st August and 30th September should be paid by your client in any event — i.e. even if he makes default in payment of the balance of the purchase money.

The amount thereof payable by your client now will be $35,500 made up as follows:—

| | | |
|---|---|---|
| (1) | Further deposit ... ... ... ... | $30,000 |
| (2) | Cost of weeding and maintenance ... | 3,000 |
| (3) | To a/c. of the sum payable as consideration for extension of time ... ... ... | 2,500 |
| | | $35,500 |

It is desired that time should be expressed to be of the essence of the contract and that the acceptance date shall be deemed to have been the 8th day of August, 1960.

We shall therefore be glad if you will prepare a supplemental agreement on the above lines and let us have draft thereof for approval."

That said in effect "we will give you time to pay if you pay for it".

Then on 17th August the purchaser's solicitors wrote as follows:—

"Further to your letter of the 11th instant, we now enclose a draft of the supplemental agreement for your approval.

With regard to para. 4 of the enclosed draft, we are instructed that this proposal has been agreed in principle with the representative of your clients. We are further instructed to suggest that the date for final completion should be the 18th of October as stated in para. 5 of the enclosed draft.

If the draft is acceptable to you, we will engross the same forthwith and have it executed by our client and send the same to you for execution by your clients together with a cheque for $35,500 being the amount payable thereunder on execution, upon your undertaking to hold the same pending execution by your clients."

The draft contract was enclosed. It embodied the terms contained in the letter of 10th August, it provided that the date of completion under the original contract should be 18th October (and not 7th August) and it provided that time should be of the essence of the original contract. It also

included, however, a clause which embodied the instalment sales arrangement. That clause read as follows:—

"4. Prior to the date hereinafter fixed for the completion of the purchase the vendors will at the request of the purchaser execute and deliver to the purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the First Schedule to the principal agreement upon payment to the vendors of the *pro rata* purchase price of $1,800 per acre or such increased price as the purchaser shall have arranged to sell any such part or parts of the said land to a sub-purchaser and any such excess price shall be retained by the vendors to account of the balance payable on completion but shall not be considered as further deposit."

The reaction of the vendor was immediate and unmistakable. On 19th August his solicitors addressed the following telegram to the purchaser's solicitors, the terms of which were confirmed by letter the same day:—

"YOUR LETTER SEVENTEEN AUGUST DRAFT AGREEMENT UNACCEPTABLE PARAGRAPH FOUR NEVER AGREED TO BY OUR CLIENT NOR HIS REPRESENTATIVE STOP UNLESS DOLLARS THIRTY-FIVE THOUSAND FIVE HUNDRED PAID TO US IN CASH OR BANKDRAFT IN NAME OF ALLEN GLEDHILL AND BALL BEFORE ONE POST MERIDIEM TWENTIETH AUGUST TOMORROW IN TERMS OF YOUR LETTER TENTH AUGUST AND OUR REPLY ELEVENTH AUGUST DOLLARS NINETY THOUSAND WILL BE FORFEITED PURSUANT AGREEMENT OF THIRTY-FIRST."

In other words the vendor was not prepared to accept the instalment sales arrangement but he was prepared to give time if it was paid for and what he insisted on was not immediate payment of the whole balance of the purchase price but immediate payment of the money that had been offered for extension of time in the letter of 10th August.

The purchaser did not regard the demand for immediate payment of the $35,500, with which he was both able and willing to comply, as in any way unreasonable. What he did object to was the rejection of the instalment sales arrangement. That is clear from what followed.

The following morning a cheque was drawn by the purchaser and Mr. Williams for $35,500 and a meeting was held between the purchaser and Mr. Raja and the land broker and the purchaser's solicitors. The purchaser's evidence as to that meeting was as follows:—

"After discussion ..... after the amendment of the Supplemental Agreement we found it was unacceptable. They decided that if they could not dispose of the small acreages, it would be difficult for the company to operate. Without the opportunity of selling small acreages we would find it difficult to get finance. ..... The cheque for $35,500 would have been a good cheque. Afterwards it was torn up. We did not get in contact with the defendants' solicitors after receiving the telegram because there would be no point in proceeding with the matter."

In accordance with the decision made at that meeting no reply was sent to the telegram of 19th August and on 22nd August the vendor's solicitors asked for the return of the titles. On 25th August the purchaser's solicitors replied to the effect that time was not of the essence of the contract and that in their view objection to the clause in the draft contract submitted by them did not entitle the vendor to rescind the original contract and forfeit the deposit. On 29th August the vendor's solicitors replied insisting on their right to forfeit the deposit but saying that, without prejudice to their contention that they were entitled to do so, they were prepared to negotiate a fresh contract. To that end they returned the draft contract which had been sent to them on 17th August with a number of suggested amendments, the only one of which of importance being the deletion of the objectionable Clause 4.

There was no reply to that letter and on 22nd November, 1960, the purchaser commenced the present proceedings in which he claimed the return of his deposit of $90,000 but did not claim specific performance of the agreement to sell the land. The vendor counterclaimed for specific performance of the contract of 31st May or alternatively rescission of the contract and a declaration that the $90,000 deposit was forfeited.

The only other fact that calls for mention is that at no time did the purchaser enter into possession of the land although under the contract of 31st May, 1960, he was at liberty to do so as from that date.

In the event Azmi J. gave judgment for the purchaser as prayed. He was of the opinion that there were no circumstances from which he could hold that time was of the essence of the contract and that the telegram of 19th August did not have the effect of making time of the essence. He concluded as follows:—

"In my view, there is no doubt at all that the defendants, through their solicitors, by their telegram of the 19th August, 1960, had put an end to the contract probably under Clause 8 of the contract, and mainly, I think, because of the plaintiff's attempt to include Clause 4 of the Supplemental Agreement. I have held that time was not of the essence of the contract and has never been so and also that there has been no unreasonable delay by the plaintiff in that he expected that he would be given time, on certain terms, until the Supplemental Agreement has been executed. He would, if he had asked for specific performance, undoubtedly have a good case.

For these reasons, I would hold that the plaintiff would be entitled to the return of the deposit in terms of his prayer."

Against that decision the vendor has now appealed.

Now, this is not an action for specific performance, it is an action for return of a deposit and as Cotton L.J. observed in the case of *Howe* v. *Smith*, [1] that is "essentially a claim at Common Law". Regarding the case in the first place from that point of view there is little room for doubt as to the legal rights and obligations of the parties. The obligation of the purchaser under the contract of 31st May was to pay "the balance

of the purchase money", which was approximately $800 000, at the office of the vendor's solicitors on or before 7th August, 1960. If that obligation was not discharged then, by reason of Clause 8 the contract was at an end and the deposit of $90,000 became forfeited to the vendor. It is common ground that that obligation to pay $800,000 was not discharged on 7th August, 1960, or at any other time. On 7th August, 1960, the purchaser either did not have $800,000 or he did have it but was not prepared to pay it to the vendor. His attitude was that he wanted either a new contract or a modification of the old contract (it is immaterial in which way it is regarded) which would include a provision, which, in effect, would allow him to sell some of the land piecemeal and so acquire some of the money to pay for the balance. For such a contract he was prepared to pay an additional monetary consideration. There was, of course, nothing wrong in this. The new contract might well have turned out to be as advantageous to the vendor as the old one. Nevertheless it was a different contract. It is merely playing with words to say that what was involved was some discussion as to the method of performance. There is all the difference in the world between $800.000 paid in one lump sum on the nail and $800 000 paid in instalments and in the way suggested; and that was the difference between what the vendor had contracted to get and what the purchaser proposed he should get for his land.

In the circumstances the vendor was entirely within his legal rights in treating the contract at an end and the deposit as forfeited and the only question which calls for consideration is how far the legal rights of the parties are modified by the rules of equity.

Both at the trial and in this Court a great deal of attention was devoted to a discussion of the equitable rule that in contracts for the sale of land provisions as to the time of performance are not to be strictly construed unless time is expressly made of the essence of the contract.

In England the application of that rule is now governed by section 41 of the Law of Property Act, 1925, which replaced section 25(7) of the Judicature Act, 1873, and which reads as follows:—

> " Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

For myself, however, I must confess to some doubt as to how far the rule has any application in this country.

In our legislation there is nothing corresponding to section 41 of the Law of Property Act and if the rule applies at all it is by reason of section 3 of the Civil Law Ordinance, 1956, which reads as follows:

> " (1) Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance:
>
> Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Ordinance or any other written law in force in the Federation or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail."

It may well be that the rule with which we are here concerned comes within the proviso to sub-section (1) of that section. It is said by the learned author of *Williams* on "Vendor and Purchaser" (3rd ed. p. 53) that:—

> " When one considers all the delays that have been condoned in equity on the ground that time is not of the essence of a contract to sell land, it appears very questionable whether this doctrine has really conferred any benefit upon the community",

and in this country it must indeed be a little difficult for a person like the vendor to whom Henry II is probably but a name, who may not have heard of the Statute of Uses and who may seldom read the works of the late Professor Maitland to understand why the terms of a contract should be sacrosanct except when it relates to the sale of land.

Be that as it may, however, in the past it has been assumed, rather than held, by the Courts here that the rule is of local application (see *Lai Choon* v. *Fong Chow* [2]) and the question has not been raised by either side in the present case. Moreover, in England as Lord Loreburn L.C. pointed out in the case of *Stickney* v. *Keeble*, [3] the rule is connected with "the state of the law relating to real property" in that country and it is possible to argue that in this country the position may be different in the States of Malacca and Penang from what it is in the other States where the basis of the land law is the Torrens System of Registration of Title and where the law of contract is set out in a statutory code. In the circumstances I propose to deal with the present case on the assumption that the rule does apply.

It is important, however, to be clear as to what the so-called rule is, for it is certainly not a sort of rogue's charter which says that in every contract for the sale of land there is an implied condition that any term relating to time is to be treated as giving either of the parties as much latitude as to the time of performance of his obligations as he may find convenient irrespective of the views of the other.

A simple statement of the rule in its modern form is to be found in the judgment of Lord Parker of Waddington in the case of *Stickney* v. *Keeble, supra,* (at p. 415). His Lordship pointed

out that in a contract for the sale or purchase of land the time fixed by the parties for the completion was at law always regarded as essential.

" In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

That is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract,"

To discover, then, the scope of the rule we must look to the cases in which the Court of Chancery would have interfered with the process of the Courts of Common Law prior to 1873, and these cases are set out in the following passage from the judgment of Lord Cairns in *Tilley* v. *Thomas* [4] quoted by Viscount Haldane in the Privy Council case of *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* :— [5]

" A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* [6] there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. That is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, trusts, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

So much for the rule that time is not of the essence of a contract for the sale of land.

The present case, however, is not a straightforward case as to the application of that rule.

What the purchaser was asking for here was not specific performance of the contract it was the return of his deposit and that depends on the question of whether in all the circumstances a Court of Equity would have relieved him from forfeiture of his deposit.

Now, with great respect, I cannot accept the view of Azmi J. that if the purchaser had asked for specific performance he would have had a good case. He would have had a bad case for the simple reason that at no time was he ready or willing to perform his own obligation under the contract which, apart from any question of time, was to pay some $800,000. It is true he was prepared to make arrangements which were designed to ensure that the vendor should eventually receive the whole of the purchase money but he was not ready or willing to put the money on the table.

And strictly speaking his legal obligation was to put the money on the table. It is well settled that in the case of a sale of land the vendor is only bound to accept legal tender (see *Williams*, "Vendor and Purchaser" 3rd ed. p. 698). He is not bound to accept a banker's draft or a cheque. Many of us have heard from elderly solicitors nostalgic reminiscences of how they used to accompany their masters on such occasions to the office of the vendor's solicitors carrying a bag of golden sovereigns. In the words of Lindley L.J., in the case of *Pape* v. *Westacott* :— [7]

" Let us take a case that lawyers are familiar with — the sale of real property. Let us take the case of a solicitor who is entrusted by the vendor with the completion of the transaction. Is that solicitor justified by the ordinary course of business or the ordinary habits of men in parting with the conveyance and the title-deeds in exchange for a promise to pay or a cheque? Certainly not."

Now, under the instalment sales arrangement proposed and insisted on by the purchaser the vendor might have been as well off in the end as if he had received payment for all the land and conveyed it all on the same day. But he might not have been. In every executory contract for sale the vendor takes the ordinary commercial risk that the purchaser will not perform his part. He may attempt to repudiate or he may go bankrupt or for some other reason he may be unable to perform his part. That is the ordinary risk of the market, and if it occurs the vendor must look elsewhere for a market for his land or his goods. He still has his land and if he suffers loss he has his action for damages for what it is worth.

In the present case the position under the original contract was that the vendor did not have to convey any of the land till he had the full purchase price. If anything went wrong he still had his land and he had his deposit which would compensate him, at least to some extent, for any loss of profit he might suffer from having to sell elsewhere at a lower price. Under the proposed instalment sales arrangement, however, he was to convey the smaller but more valuable pieces of the land to third parties as and when such third parties were introduced to him by the purchaser. It is true the purchase money for these small pieces was to be paid to him but if after he had parted with them the purchaser had then refused or failed to pay the balance of the agreed purchase price he would have been left with the larger pieces and to sell them without the attractive small pieces might well have been a more difficult task than to sell all the seven pieces together and the financial outcome would have been to some extent dependent on the price of rubber land which is something which is affected by the current price of the commodity. (If that statement requires supporting evidence it is to be found in the valuer's report.) The risk involved in terms of money might not have turned out to be any greater than the risk involved in the original arrangement. That is a matter for speculation and the purchaser's view clearly was that it was no greater, because he clearly thought he would come out of the matter with profit if the new arrangement was accepted. But it was a different risk and it was for the vendor to say whether or not he was prepared to accept it.

It may be that if after the dispute in August, 1960, the purchaser had taken up the attitude that if he could not have the original contract varied in accordance with his wishes he insisted on standing on that contract as it stood and if he had been willing to pay the balance of the purchase money he would have been successful in obtaining specific performance.

But that is not what has happened. He is not asking for specific performance. He is asking in effect to be off with his bargain, to be relieved from forfeiture of the security he has given for its performance and to get back the money that has already been paid in part payment. This demand has been based on the ground that the vendor was not entitled to treat the contract at an end by reason of his failure to comply with his legal obligation under it because in equity so much of that obligation as consisted in payment on a fixed day was not binding on him. But clearly his real case is that a Court of Equity would and should relieve him from the forfeiture which he had incurred in law.

Now the case of *Steedman* v. *Drinkle* [8] is some authority for the proposition that the fact that a plaintiff is not entitled to specific performance will not of itself necessarily prevent him from obtaining relief from forfeiture of an instalment he has paid towards the purchase price, though as was pointed out by Farwell J., in the case of *Mussen* v. *Van Diemen's Land Co.* [9] it may be that "that case really turns on the particular circumstances there existing". Nevertheless I can see no ground in the present case on which equity would have given or should give relief.

At this stage I would quote the following further passage from the judgment of Lord Parker of Waddington in the case of *Stickney* v. *Keeble, supra,* (at p. 417). In it he discusses section 25(7) of the Judicature Act, 1873, but his observations are of general application.

> "It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the Courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law the Court of Chancery took cognizance of everything which had happened up to the date of the decree, and in applying section 25, sub-section 7, of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The section cannot in my opinion mean that the rules as to time laid down by Courts of Equity in certain cases, for certain purposes, and under certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Judicature Acts the Court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity."

The truth here is that ever since he failed to comply with his legal obligation to pay the purchaser has in effect wanted indulgence not only as to time (which equity might have given him) but as to the very nature of that obligation. He has throughout insisted that he is entitled to some relief as to the very nature of his obligation and that he is not prepared to go on with the contract unless he gets it. In the circumstances I do not think he is entitled to rely on the argument that he might have been entitled to relief as to time alone to support his present claim to the return of the money paid as part payment and deposit, which is what he is asking for. This is really based on the contention that although the vendor may have been justified by law in treating the contract as at an end when the purchaser made it clear that he was not prepared to go on unless not only in his own time but also in his own way which involved a material variation of his own obligation nevertheless the vendor's action in doing so was so unconscionable as to invoke the interference of equity.

In the case of *Scott* v. *Alvarez* [10] it was said by Rigby L.J.:—

> "The question to what extent a Court of Equity will go is very largely one of authority as to what has been done before."

That case, incidentally, is one which illustrates the extent to which a Court of Equity will not go. It was a case where a vendor was refused specific performance of a contract because he could not make out a good title. Yet the purchaser was refused the return of his deposit because by reason of a clause in the contract the purchaser was precluded from making enquiries as to the period during which the defects in the chain of title were found to exist.

For myself I can find no authority to show that the Court should go as far as it is asked to go here and my view on principle is that it would be wrong to do so.

I find support for that view in what was said in the cases of *Mussen* v. *Van Diemen's Land Co., supra,* and *Stockloser* v. *Johnson* [11]. The facts of these cases were, of course, different from the facts here. In particular in both cases the party asking for relief had been in possession of at least part of the property concerned. Nevertheless the principles involved were the same.

In *Mussen* v. *Van Diemen's Land Co.* there was a contract for the sale of a number of pieces of land and for payment by specified instalments. Two of the pieces of land were conveyed to the purchaser and at the time of the conveyance the total payments made by him came to more than the sum of the prices attributed to these two pieces of land in the schedule to the contract. Thereafter the purchaser, owing to financial difficulties made no further payments and after a

time the vendor in accordance with the terms of the contract rescinded the contract and entered into possession of the land that had not been conveyed. After some considerable time the purchaser sued for the difference between what he had paid and the land that had been conveyed to him. It was held that he should not be allowed to do so and Farwell J. said (at p. 217):—

"It is no ground for giving relief to a person from the effect of the contract which he himself has made to say that he has, through no fault of the defendant whatsoever, found himself in difficulties, or that it may turn out to be not a good bargain from his point of view. Considerations of that sort are wholly irrelevant. It matters not, so long as nothing has been done which can be said to be the fault of the defendant. The mere fact that the plaintiff finds himself in difficulties is in itself no ground for invoking the assistance of equity. He must have known when he entered into it that, if he found himself for any reason in the unfortunate position in which he was in 1931, he would lose the money which he had already paid. Both sides must have realised that, and must have intended that result. How can it be said that, because that event has happened, it is unconscionable for the defendants to retain the money? I know of no case in which such a claim has been successfully made, with the possible exception of one case to which I must refer in a moment."

That case was the case of *Steedman* v. *Drinkle*, which has already been mentioned, which in his Lordship's view was a case where the Privy Council "treated the matter as though the appellant were ready and willing to perform the contract and the respondents were refusing to permit specific performance, and the court itself was unable to decree specific performance because of the terms of the contract". He then went on (at p. 217):—

"There are cases in which there has been failure to pay instalments or to complete the contract, or where there has been some breach of some term of the contract, and the plaintiff then comes forward and says, 'I am here and now ready and willing to complete the contract, and to pay the price stipulated by the contract, and to carry out the terms of the contract,' and then the court has said that it is inequitable and against conscience that the defendant should refuse to complete the contract and retain the money which has been paid. The courts say that that is not conscionable. They say that, since the contract is to be performed, it is unconscionable to make the plaintiff pay over again the whole of the purchase price stipulated by the agreement, but the defendant is bound to treat the money which has already been paid as part-payment of the purchase price."

In the case of *Stockloser* v. *Johnson* the defendant had sold to the plaintiff some plant and machinery and the benefit of certain hiring agreements. The price was payable by instalments and the contract between the parties provided that in default of an instalment the defendant was to be entitled to re-take the subject matter and that in such event all payments made should be forfeited to the vendor. The purchaser defaulted in payment of some instalments and the vendor rescinded the contract and treated the instalments already paid as forfeited. The purchaser brought an action which was unsuccessful to recover the amount thus treated as forfeited on the ground that its retention by the vendor amounted to the exaction of a penalty. In the Court of Appeal all three Judges, though they did not altogether agree as to the extent of the equitable jurisdiction to give relief in such a case agreed that to invoke the aid of that jurisdiction a plaintiff must shew that there is something "unconscionable" about allowing the defendant to retain the money he has forfeited. They also shewed substantial agreement with the judgment of Farwell J. in *Mussen* v. *Van Diemen's Land Co.*

Somervell L.J. referred to the judgment of Romer L.J. which he had read and said this (at p. 634):—

"Romer L.J. comes to the conclusion that after rescission by the vendor relief would be given only if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think they indicate that the Court would have power to give relief against the enforcement of the forfeiture provisions although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances."

Denning L.J. said (at p. 637) there was "a plain distinction between penalty cases, strictly so called, and cases like the present. He went on:—

"In the present case, however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause — a forfeiture clause, if you please — permitting him to keep it."

Later he said:—

"When there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. .....

.....

Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."

The views of Romer L.J. have already been indicated in the quotation from the judgment of Somervell L.J., but in relation to the question of hard bargains he said this (at p. 641):—

"If one of the terms which the vendor requires is unacceptable to the purchaser, he is under no compulsion to accept it. He can either keep his money and forgo the property or he can purchase a similar property from some other vendor who is more tolerant in his approach to the conditions of sale. If a man agrees to buy property by instalments which he will forfeit to the vendor if he cannot continue them to completion, he knows perfectly well the risk which he is taking and I do not know what right he has to appeal to equity if that risk does in fact ripen into actuality. That was the view which Farwell J. expressed without hesitation in *Mussen's* case, and I respectfully and entirely agree with it."

In all that I can find nothing to support the purchaser in the present case. The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the vendor's action in retaining the money is unconscionable.

For these reasons I would allow the appeal with costs and order judgment to be entered for the appellants (that is the vendor) with costs. As regards the counterclaim, I do not propose to deal with it beyond saying that the claim for a declaration is now otiose and that in my opinion the vendor in the light of all that happened was not entitled to specific performance. It would appear that, at any rate up to the time of trial, he had not put it out of his power to perform his part in that he had not sold the land to another purchaser. Nevertheless he has from the beginning taken up the attitude that he was relying on his own legal rights and the purchaser's lack of equitable rights and in my view he should be held to that election.

Hill and Barakbah JJ.A. concurred.

*Appeal allowed.*

Solicitors: *Allen, Gledhill & Ball; Braddell & Ramani.*

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## LIEW HON NYUK & ORS. v. LEE NYEAN CHOONG & ORS.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) March 11, 1963]

[Ipoh — F.M. Civil Appeal No. 40 of 1962]

*Administration — Transferring properties to company by deceased before his death — Company directors being executors trustees and beneficiaries under deceased's will — Proceedings for distribution of estate — Statement of accounts — Correction of.*

*Practice and Procedure — Application under O.55 r.3 — Summons-in-chambers, by — Whether procedure adopted correct.*

Prior to his death, the deceased transferred the greater part of his property to a company incorporated on 2nd September, 1946 and in which he was the principal shareholder. On the same day he made a will appointing the 1st, 2nd and 3rd respondents, who were directors of the company, executors and trustees of his will. All the appellants and the respondents are beneficiaries under the will, a portion of which forbade the trustees to be engaged in any business or businesses of their own so long as they were acting as executors and trustees and declared that they were entitled to a salary of $200 a month so long as they should act as executors and trustees.

In the course of administration large sums of money had to be found for various purposes and the executors defrayed so much of the expenses of administration as exceeded the income out of the company's funds. The payments so made were treated for book-keeping purposes as interest-free loans from the company. Several years later the present appellants commenced proceedings against the executors asking for distribution of the estate and for taking accounts of the administration. Appearance was entered and affidavits were filed by both parties which showed that one Mr. P was appointed to complete the collection, administration, and distribution of the assets. On July 28, 1961 the respondents filed a statement of accounts prepared by Mr. P which showed that on 30th June, 1961 the amount owed by the estate to the company in respect of advances was $157,156.57. On 9th May, 1962 the respondents took out a summons-in-chambers under Order 55 rule 3 asking for an order that they be at liberty to transfer certain immovable property to the company in full and final satisfaction of the liability of the estate to the company.

The respondents filed an affidavit exhibiting a valuation by an architect of the property as at $140,200. One of the appellants filed an affidavit in reply stating that P's figures did not represent the true state of any indebtedness between the estate and the company as the monevs advanced included remuneration to the executors which amounted to $51,000. The matter came before the learned judge who made the order as prayed. On appeal,

**Held:** (1) the matter should not have been disposed of in chambers but as its correctness had not been questioned at any time and as the point did not go to jurisdiction, it should not be taken on appeal;

(2) by acting as directors in the company, the executors have not engaged "in business of their own" in the sense intended by the testator and therefore they were entitled to their remuneration.

*Cases referred to:—*

(1) *Todd* v. *Moorhouse* L.R. 19 Eq. 69.
(2) *Peak* v. *Jones* [1914] 1 Ch. 742
(3) *In re Turcan* 58 L.J. Ch. 101.
(4) *Forrester* v. *Jones* [1899] W.N. 78.
(5) *Davis* v. *Galmoye* 39 Ch. D. 322.
(6) *Boyes* v. *Cook* 14 Ch. D. 53.

COURT OF APPEAL.

*Lim Kean Chye* for the appellants.

*N. T. Rajah* for the 1st, 2nd and 3rd respondents.

*P. P. Dharmananda* for the 4th and 5th respondents.

*N. H. Chan* for the 6th and 7th respondents.

*Cur. Adv. Vult.*

**Thomson C.J.:** This appeal arises out of the administration of the Estate of one Lee Kwee Foh who died at Ipoh on 17th June, 1953.

The deceased was a very wealthy man and from time to time prior to his death, apparently with a view to lessening the incidence of estate duty, he had transferred the greater part of his property to a company known as Lee Kwee Foh Limited which was incorporated on 2nd September, 1946, and which I shall call "the family company".

At the time of his death the deceased himself held 1,080 shares in the family company which became part of his estate and all the other shares were held by the various persons who are beneficiaries of the estate. We have not been informed as to the extent of the holding of each of these individuals, but counsel has told us that the shares are distributed among them in different proportions from those in which they benefit under the